

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

ARIEL INVESTMENTS, LLC,	)	Docket No. 15 C 3717
Plaintiff,	)	
vs.	)	
ARIEL CAPITAL ADVISORS LLC,	)	Chicago, Illinois
Defendant.	)	December 9, 2015
	)	9:55 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS - MOTION  
BEFORE THE HONORABLE MATTHEW F. KENNELLY

APPEARANCES:

For the Plaintiff:      MICHAEL BEST & FRIEDRICH LLP  
BY: MR. ARTHUR GOLLWITZER, III  
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For the Defendant:      WOLEK & NOACK  
BY: MR. ADAM WOLEK  
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Court Reporter:      MS. CAROLYN R. COX, CSR, RPR, CRR, FCRR  
Official Court Reporter  
219 S. Dearborn Street, Suite 2102  
Chicago, Illinois 60604  
(312) 435-5639

1 (The following proceedings were had in open court:)

2 THE CLERK: Case number 15 C 3717, Ariel Investments  
3 v. Ariel Capital Advisors.

4 MR. WOLEK: Good morning, your Honor. Adam Wolek and  
5 Brian Noack on behalf of defendant Ariel Capital Advisors LLC.

6 MR. GOLLWITZER: Good morning, your Honor. Arthur  
7 Gollwitzer and Zach Watters for the plaintiff Ariel  
8 Investments.

9 THE COURT: I've got before me -- what I have before  
10 me is the plaintiff's motion -- excuse me, yeah, the  
11 plaintiff's motion -- the defendant's motion, rather, that's  
12 entitled -- it's got a long title; that's why I want to call  
13 it up so I have the right thing. The computer is working  
14 slowly.

15 MR. GOLLWITZER: I think we shortened it in our  
16 response brief, your Honor, if you want.

17 THE COURT: It's the defendant's motion to reconsider  
18 the ruling on the motion to dismiss for lack of personal  
19 jurisdiction or to amend the order to certify it for  
20 interlocutory appeal under 28 U.S.C. 1292(b) and to stay  
21 proceedings in the case pending the appeal. I had asked the  
22 parties to brief a question which was raised in that, and that  
23 has to do with whether I ought to have held an evidentiary  
24 hearing of some sort before a ruling on the motion to dismiss  
25 for lack of personal jurisdiction.

1           So I will say that the Seventh Circuit's case law on  
2 this topic, the question of evidentiary hearings, is something  
3 short of a hundred percent clear. Although I am not sure that  
4 that's all that critical to this motion, the plaintiff cites  
5 in their response brief in the scheme of things a pretty gosh  
6 darn recent case called Northern Grain Marketing v. Greving,  
7 G-r-e-v-i-n-g, 743 F.3d 487, decided in 2014 by the Seventh  
8 Circuit.

9           When it talks about the standard of review over on  
10 page 491, it says, The plaintiff -- I am leaving out the  
11 cites -- The plaintiff bears the burden of establishing  
12 personal jurisdiction when the defendant challenges it,  
13 whereas, here, the district court rules on a defendant's  
14 motion to dismiss based on the submission of written materials  
15 without holding an evidentiary hearing. The plaintiff need  
16 only make out a prima facie case of personal jurisdiction. We  
17 resolve factual disputes in the plaintiff's favor in  
18 evaluating whether that showing has been made, though, in the  
19 present case, the facts material to the personal jurisdiction  
20 question are undisputed.

21           So at various points in that quote, the Court cited  
22 Purdue Research Foundation, I am not going to give the name of  
23 the defendant because it's hard to pronounce, a case from  
24 2003. And so the way they wrote that in the Northern Green  
25 Marketing case, if you look at that last sentence, it assumes

1 that there can be factual disputes that can be resolved  
2 without an evidentiary hearing, and they're supposed to be  
3 resolved in the plaintiff's favor. That's on the one hand.  
4 There's a bunch of cases that say that.

5 On the other hand is a slightly more recent case,  
6 which is called -- which is cited by the defendant, Philos,  
7 P-h-i-l-o-s, Technologies, Inc., v. Philos & D, the letter D,  
8 Inc., 802 F.3d 905 decided this year. And in that case,  
9 citing a case that was literally in the same volume of F.3d as  
10 the -- I'm sorry, it's a little earlier in F.3d than the  
11 Purdue Research Foundation case, namely, Hyatt International  
12 Corporation v. TOTO, 302 F.3d 707, a decision from 2002. The  
13 Court says that if material facts about personal jurisdiction  
14 are in dispute, the Court must hold an evidentiary hearing to  
15 resolve them. Until that hearing is held, the parties  
16 asserting personal jurisdiction may only make out a prima  
17 facie case. In some circumstances, particularly when the  
18 Court is required to assess credibility, in order to resolve  
19 factual disputes, the Court may be required to allow either  
20 cross-examination of witnesses or prehearing discovery if a  
21 party so requests.

22 So what's interesting about that is that although the  
23 Court talks about an evidentiary hearing in the first part of  
24 what I just quoted, in the last part of it, they say that the  
25 Court may be required to allow cross-examination of witnesses,

1 which, you know, by your usual definition of evidentiary  
2 hearing comes with the territory, all of which says to me that  
3 I am not entirely clear on what the Seventh Circuit means  
4 exactly or if they made it clear what they mean when they say  
5 "evidentiary hearing."

6 That aside, to the extent that this is a right  
7 somebody has, I guess in this case, the defendant, it's like  
8 any other right; it can be waived or forfeited. That's what  
9 happened here.

10 In the plaintiff's response to the motion to dismiss  
11 for personal jurisdiction, the defendant -- the plaintiff on  
12 page 2 gave the standard. By the way, the defendant's opening  
13 brief had not really talked about this particular aspect of  
14 it -- in other words, how you resolve disputes -- but the  
15 plaintiff on page 2 said, When a motion to dismiss for lack of  
16 personal jurisdiction is decided on affidavits and other  
17 documents, the plaintiff may only make a prima facie showing  
18 of personal jurisdiction to defeat the motion. The Court must  
19 accept as true all well pleaded facts alleged in the complaint  
20 and resolve any factual disputes in the affidavits in favor of  
21 the plaintiff. It cites other cases, but it's essentially  
22 what was said in this Northern Grain case.

23 MR. WOLEK: Your Honor --

24 THE COURT: In the reply brief -- I am ruling, so  
25 just keep it to yourself.

1           In the reply brief, the defendant did not take issue  
2 with that standard and did not request an evidentiary hearing,  
3 although, if you believe what the defendant is saying now,  
4 there were factual disputes all over the place. The current  
5 request for an evidentiary hearing has been forfeited or  
6 waived, whichever term you prefer.

7           Even if that were not the case, I agree with the  
8 plaintiff that the determinations on which I base the finding  
9 of personal jurisdiction were inferences from the facts, not  
10 facts themselves, and it's not clear to me, and I don't think  
11 that in that situation that an evidentiary hearing is required  
12 anyway, so I don't think that I needed to hold an evidentiary  
13 hearing.

14           The two other issues that were raised, one is  
15 essentially a reargument of the merits that the conduct, as I  
16 determined it, wasn't sufficient to give rise to personal  
17 jurisdiction. I disagree with that for the reasons that I  
18 said before. And the other one is that somehow there's a  
19 notion that I didn't say the magic words about purposeful  
20 availed itself or something like that. I certainly quoted  
21 that standard, and my conclusion was that there was a proper  
22 basis for personal jurisdiction under the law as it exists.  
23 The motion to reconsider it is denied as is the motion under  
24 1292(b).

25           I don't think this is a question under which there is

1 reasonable grounds to find some sort of a difference of  
2 opinion about what the law is in anything that's material.  
3 This whole thing about evidentiary hearings is a matter of  
4 unclarity, but that's not really critical to this. The motion  
5 to reconsider and to certify and to stay is denied.

6 The answer to the complaint is due in four weeks.  
7 That's the 6th of January.

8 We're going to have a status hearing shortly after  
9 that to set a schedule all the way through trial because I  
10 said I was going to give you a prompt trial date, and so I  
11 want you to talk about a schedule and try to agree on one. If  
12 you can't, that's fine. Just come in prepared to talk about  
13 it. We are going to do the status hearing on the 13th of  
14 January at 9:00 in the morning. That will be in chambers.  
15 Take care.

16 MR. WOLEK: Thank you, your Honor.

17 MR. GOLLWITZER: Your Honor, is it possible to do the  
18 12th of January?

19 THE COURT: Are you okay on the 12th on the defense  
20 side? Either one is fine with me.

21 MR. WOLEK: We are okay on the 12th, your Honor.

22 THE COURT: 12th of January at 9:00 o'clock.

23 MR. GOLLWITZER: Thank you, your Honor.

24 (Which were all the proceedings had in the above-entitled  
25 cause on the day and date aforesaid.)

1 I certify that the foregoing is a correct transcript from  
2 the record of proceedings in the above-entitled matter.

3 \_\_\_\_\_  
4 Carolyn R. Cox  
5 Official Court Reporter  
6 Northern District of Illinois

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/s/Carolyn R. Cox, CSR, RPR, CRR, FCRR